FOR THE PETITIONER, PRO SE
Robert M. Sklar
North Manchester, Indiana

ATTORNEYS FOR RESPONDENT
Chelsea E. Smith
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Indianapolis, Indiana

STATE OF INDIANA
BEFORE THE INDIANA EMERGENCY MEDICAL SERVICES COMMISSION

IN RE:	)	ADMINISTRATIVE CAUSE NO.
	)	
SKLAR	)	DHS-1510-EMSC-002
	)	
	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND NON-FINAL ORDER

The Petitioner in this matter, Robert M. Sklar, appeals the denial of his application for licensure as a paramedic by the Respondent, the Indiana Department of Homeland Security. For the reasons set forth below, the Administrative Law Judge **DENIES** the Petitioner's application.

Procedural Background

On April 28, 2015, the Respondent issued an order denying the Petitioner's application for licensure as a paramedic. On May 15, 2015, the Petitioner filed a petitioner for administrative review of this action pursuant to Indiana Code § 4-21.5-3-7 and also sought a stay of effectiveness of the agency's determination. His petition was granted, and this matter was subsequently assigned to the undersigned ALJ for adjudication.

The ALJ set the Petitioner's stay request for an initial prehearing conference on June 17, 2015. At the initial prehearing conference, it was determined that a stay of effectiveness—even if granted—would afford the Petitioner no relief as a remedy because the underlying agency action was to deny an initial application. It was also determined that there was no possibility of informal resolution between the parties. The ALJ therefore set this matter for an evidentiary hearing on September 24, 2015. The hearing was later continued to October 15, 2015.

On September 18, 2015, the Petitioner requested the ALJ issue subpoenas to compel the attendance of witnesses at the evidentiary hearing. The Respondent objected. The Petitioner, in his response to the Respondent's objection, requested that the ALJ disqualify himself. The ALJ denied that request in an order dated September 21, 2015.

The evidentiary hearing was held on October 15, 2015. Both parties appeared at the hearing and presented evidence and witnesses. Following the hearing, the parties agreed to submit proposed findings of fact and conclusions of law. Both parties did so within the time allotted.[1]

Burden and Standards of Proof

Indiana Code § 4-21.5-3-14(c) provides that at each stage of an administrative review, "the agency or other person requesting that an agency take action or asserting an affirmative defense specified by law has the burden of persuasion and the burden of going forward with the proof of the request or affirmative defense." That burden rests upon the agency when the agency is, in essence, prosecuting a petitioner for a regulatory violation. See Peabody Coal Co. v. Ralston, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991). But when it is the petitioner who has sought an agency action or claimed entitlement to an exemption from regulatory requirements, the burden rests upon that petitioner. See Ind. Dep't of Natural Res. v. Krantz Bros. Constr. Corp., 581 N.E.2d 935, 938 (Ind. Ct. App. 1991).

Proceedings held before an ALJ are de novo, Ind. Code § 4-21.5-3-14(d), which means the ALJ does not—and may not—defer to an agency's initial determination, Ind. Dep't of Natural Res. v. United Refuse Co., Inc., 615 N.E.2d 100, 104 (Ind. 1993). Instead, in its role as fact-finder the ALJ must independently weigh the evidence in the record and matters officially noticed, and may base its findings and conclusions only upon that record. Id.; see also Ind. Code § 4-21.5-3-27(d).

At a minimum, the ALJ's findings "must be based upon the kind of evidence that is substantial and reliable." Ind. Code § 4-21.5-3-27(d). "[S]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the decision." St. Charles

[1] Ms. Smith served as counsel for the Respondent throughout the substantive portions of this proceeding. She has since departed the agency and Ms. Walters is now the Respondent's counsel for this appeal.

Tower, Inc. v. Bd. of Zoning Appeals, 873 N.E.2d 598, 601 (Ind. 2007). It is "something more than a scintilla, but something less than a preponderance of the evidence." State ex rel. Dep't of Natural Res. v. Lehman, 177 Ind. App. 112, 119, 378 N.E.2d 31, 36 (1978) (internal footnotes omitted).

When a Fourteenth Amendment interest is put at risk by an agency action, however, a higher standard of proof is required. Pendleton v. McCarty, 747 N.E.2d 56, 64–65 (Ind. Ct. App. 2001), trans. denied. "[I]n cases involving the potential deprivation of . . . protected property interests, the familiar 'preponderance of the evidence standard' [is] used." Id. at 64. But the higher "clear and convincing" standard is required when a protected liberty interest is at stake. Id. That is to say, this standard applies when "individual interests at stake in a particular state proceeding are both 'particularly important' and 'more substantial than the mere loss of money' or necessary to preserve fundamental fairness in a government-initiated proceeding that threaten[s] an individual with 'a significant deprivation of liberty' or 'stigma'." Burke v. City of Anderson, 612 N.E.2d 559, 565 (Ind. Ct. App. 1993) (quoting In re Moore, 453 N.E.2d 971, 972 (Ind. 1983)), trans. denied; see also Pendleton, 747 N.E.2d at 64.

Findings of Fact

At the evidentiary hearing, both parties appeared and presented witnesses.[2] Both parties also submitted documentary evidence.[3] Based solely on the evidentiary record presented by those

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[2] The Petitioner's witnesses were Ms. Candice Hilton, Ms. Karrie Cashdollar-Dillon, and Mr. Josh Kreigh, all employees for the Respondent who either currently work or had worked in the Respondent's Emergency Medical Services Section, and Mr. Gregory Brown, the Deputy Training Chief for Team Life, Inc. The Petitioner himself also testified in narrative form. The Respondent's sole witness was Ms. Robin Stump, the Respondent's Emergency Medical Services Section Chief.

[3] The Respondent submitted court records regarding a prior conviction of the Petitioner (Resp. Ex. 1); a 1993 letter to the Petitioner from the Medical Director of Kern County, California's Emergency Medical Service (Resp. Ex. 2); the Petitioner's application for certification as an Emergency Medical Technician in Pennsylvania (Resp. Ex. 3); a 2000 decision by the New Jersey Department of Health and Senior Services related to the Petitioner (Resp. Ex. 4); a 2001 decision by the New Jersey Department of Health and Senior Services related to the Petitioner (Resp. Ex. 5); a 2002 Commonwealth Court of Pennsylvania decision related to the Petitioner (Resp. Ex. 6); a criminal record check run by the Pennsylvania State Police on the Petitioner in 2014 (Resp. Ex. 7); the Petitioner's 2012 application for licensure as a paramedic in Indiana (Resp. Ex. 8); the Petitioner's 2013 application for licensure as a paramedic in Indiana (Resp. Ex. 9); the Respondent's Order No. 0040-2015, denying the Petitioner's application for licensure (Resp. Ex. 10). All of these exhibits were admitted by stipulation.

exhibits, the testimony given at the hearing, and those matters officially noticed, the ALJ hereby makes the following findings of fact:

1. In April 1990, the Petitioner was charged by the University of Colorado-Boulder Police Department with four counts of wiretapping and one count of obstructing government operations. The charges stemmed from the Petitioner intentionally attempting to obstruct campus police officers from providing services off-campus by several means—including interfering with the police communications of officers.

   On August 3, 1990, the Petitioner pleaded guilty to the obstructing government operations charge; the wiretapping charges were dismissed. The Petitioner was sentenced to six months of probation and one hundred hours of community service, which he completed.

2. On June 24, 1993, the Medical Director of the Kerns County, California, EMS Department revoked the Petitioner's EMT-Paramedic certification as a result of an investigation into the Petitioner's "possession and use of unauthorized ALS medication, equipment, and other paraphernalia." (Resp. Ex. 2.)

3. In 1997, the Petitioner submitted an application to the New Jersey Department of Health and Senior Services, seeking reciprocity licensure as a paramedic. In his application, he denied that his EMT-Basic or EMT-Paramedic certifications had ever been suspended or revoked. In 1998, the New Jersey DHSS learned of the 1993 Kern County revocation and revoked the Petitioner's New Jersey EMT-Paramedic certification.

   The Petitioner filed an administrative appeal of this New Jersey DHSS action. The ALJ and ultimate authority in that appeal both concluded that the Petitioner had fraudulently procured his New Jersey certification by "intentionally and willfully omitting a material fact from his application." (Resp. Ex. 4 at 6.) The Petitioner's certification was suspended for approximately twenty-four months and then reinstated subject to an eighteen-month probationary period.

4. In 1999, the New Jersey DHSS received a complaint that the Petitioner, while serving as an EMT-Basic, had inappropriately administered medication to a patient in cardiac arrest. The New Jersey DHSS conducted an investigation into the complaint and found it valid, in that the Petitioner had removed a syringe of

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The Petitioner's witness and exhibit list identified eighteen exhibits. It was later determined, however, that many of these were contained within the Respondent's exhibits and did not need to be admitted again. The Petitioner also voluntarily withdrew a number of his other proposed exhibits. Ultimately, the parties stipulated to the admission of a 1994 letter from the Maryland Institute for Emergency Medical Services Systems to the National Registry of Emergency Medical Technicians (Pet. Ex. 8) and a letter from Mr. David G. McIntyre, III, the owner of Keystone Medical Response in Pennsylvania (Pet. Ex. 18).

Epinephrine from the EMT-Paramedic's medication kit and administered it to the patient—an act outside his approved scope of practice as an EMT-Basic. As a result, the New Jersey DHSS revoked the Petitioner's EMT-Basic certification.

The Petitioner filed an administrative appeal of this New Jersey DHSS action as well. The ALJ and ultimate authority in that appeal affirmed the revocation of the Petitioner's EMT-Basic certification because EMT-Basics were not permitted to administer any kind of medications; that the Petitioner acted willfully; and that at time the incident occurred, the Petitioner's New Jersey EMT-Paramedic certification was suspended.

5. In 1998, the Petitioner applied for paramedic certification in Pennsylvania. The Commonwealth of Pennsylvania's EMS Office, with knowledge of the Petitioner's 1990 conviction and 1993 Kern County revocation, granted the Petitioner's application.

   Shortly thereafter, the Petitioner—acting as Executive Director and Vice President of a company called Regional Medical Transport— misrepresented to a medical center that RMT was authorized to transport advanced life support patients when RMT was only authorized to transport basic life support patients. The medical center, believing the Petitioner's misrepresentation, entered into a contract with RMT to provide advanced life support transport services. When RMT was directed to transport an advanced life support patient for the medical center, it instead arranged for a basic life support ambulance service licensed in New Jersey—not Pennsylvania—to provide the transport. The Petitioner eventually admitted that RMT did not have authority to transport advanced life support patients.

   The Petitioner sought the issuance of an advanced life support license on behalf of RMT "through an aggressive series of almost daily phone calls to the EMS Office." (Resp. Ex. 6 at 3.) The Petitioner "sometimes disguised his voice and would call repeatedly within minutes of a previous call," identified himself as Mohammar Khadaffi, told the EMS Office staff things like "Don't f--k with me," "F--k you," and "You better stop shittin' with me. I'm telling you, you better stop shittin' with me. You know what happened at Columbine High School." (Resp. Ex. 6 at 3–4.) He called the EMS office thirty-four times in one day, told staff members that they had marital and mental problems, and told a staff member in person to "go f--k yourself," gave the staff member the finger, and refused to leave the staff office until security called. (Resp. Ex. 6 at 4.)

   The EMS Office denied RMT's advanced life support license and imposed disciplinary sanctions on the Petitioner for being convicted of a crime involving moral turpitude, for misrepresenting the status of an ambulance service constituting a threat to public safety, and for not being a responsible person in the context of the staffing of an ambulance service. Additionally, the Petitioner

was charged with (but acquitted of) criminal harassment for his actions with respect to the EMS Office staff. This agency action was affirmed on judicial review.[4]

6. In April 2001, the Petitioner was arrested and charged in Pennsylvania with various counts of misdemeanor Harassment by Communication. He was found guilty by a jury of ten of the counts, all third-degree misdemeanors.[5]

7. Since approximately 2004 or 2005, the Petitioner has been teaching EMS-related courses under the supervision of Mr. Gregory R. Brown, a certified EMT, paramedic, and EMS instructor in Pennsylvania, and Deputy Training Chief of Team Life, Inc. The Petitioner has never had any substantial issues or problems under Mr. Brown's supervision, and the Petitioner's instructor evaluations are typically exemplary.

8. On June 19, 2012, the Petitioner submitted an application to the Respondent, seeking reciprocity licensure as a paramedic based on his licensure as a paramedic in New York—and that licensure was set to expire on June 30, 2012. This application was not granted.[6]

9. On September 6, 2013, the Petitioner submitted a second application to the Respondent, again seeking reciprocity licensure as a paramedic—but this time based on his certification with the National Registry of Emergency Medical Technicians. That certification was active at the time of his application and is not due to expire until March 31, 2016.

10. On the Petitioner's September 6, 2013, application, he checked a box answering "Yes" to the question "Have you ever been arrested for or convicted of a crime that has not been expunged by a court? (Excluding minor traffic violations)." (Resp. Ex. 9 at 2.)

11. The Respondent then requested information regarding those arrest(s) and conviction(s), as well as information concerning any instances in which the

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[4] Another entity, Keystone Medical Response, was also sanctioned by the EMS Office but its appeal appears to have been settled. (Resp. Ex. 6 at 2.)

[5] The evidence indicates that this was a different instance of harassment than the instances involving the EMS Office.

[6] It is not exactly clear, as a matter of fact, what the outcome of the application was other than it not being granted—there certainly is no order overtly *denying* the Petitioner's 2012 application. There was some testimony that the application likely could not be processed and completed before the Petitioner's New York license expired, and the evidence also indicates that issues arose related to the Petitioner's criminal history, but none of the witnesses had first-hand knowledge of the application outcome. In any case, the Respondent does not dispute that there were issues in how the Petitioner's application(s) might have been processed—but the issue on appeal is whether the Petitioner is entitled to licensure based on his subsequent application, to which the events surrounding the initial application are useful for background but not otherwise determinative.

Petitioner's emergency medical service professional licenses or certifications had been revoked.

12. On April 28, 2015, the Respondent issued an order denying the Petitioner's application for licensure as a paramedic on the basis of the Petitioner's criminal conduct in Colorado and Pennsylvania, and for failing to disclose instances in which his certifications and/or licensure were revoked or suspended.

Conclusions of Law

Applying the law set forth in this decision to the factual findings supported by the evidence, the ALJ hereby reaches the following conclusions of law with respect to the issues presented:

1. The Petitioner here filed an application seeking a license from the Respondent; he is asking the Respondent to take action as an agency. Accordingly, the Petitioner bears the burdens of proof and production. Ind. Code § 4-21.5-3-14(c); Krantz Bros. Constr. Corp., 581 N.E.2d at 938.

   Because this is not a matter in which the Respondent is seeking to deprive the Petitioner of a protected property or liberty interest, however, the higher standards of proof used in those cases are not applicable here. Cf. Pendleton, 747 N.E.2d at 64. Instead, the usual standard of proof for administrative appeals set forth in Indiana Code § 4-21.5-3-27(d)—that of substantial and reliable evidence—applies.

2. It is therefore the Petitioner's burden in this appeal to prove, with substantial and reliable evidence, that he is entitled to licensure as a paramedic in Indiana pursuant to the statutes and regulations governing that profession.

3. The Indiana Emergency Medical Services Commission is created by statute, Ind. Code § 16-31-2-1, and is empowered to "[d]evelop training and certification standards for emergency medical responders" and "[r]equire emergency medical responders to be certified" under those standards, Ind. Code § 16-31-2-8(1), -8(2); see also Ind. Code § 16-31-2-7(2) (Commission charged to "[r]egulate, inspect, and certify or license services, facilities, and personnel engaged in providing emergency medical services").

   The Commission is also charged with establishing the standards for certification and licensing for emergency medical responders, Ind. Code § 16-31-3-2, and set those standards for education and training forth in rules, Ind. Code § 16-31-3-2(1)(A). It is also charged with establishing the application process for certification and licensure as an emergency medical responder. Ind. Code § 16-31-3-8. In accordance with the Commission's rules, the Respondent is charged

with providing and receiving the application forms. 836 Ind. Admin. Code 4-9-4.

4. Pursuant to the Commission's standards, an applicant for reciprocity licensure as a paramedic must be "affiliated with a certified paramedic provider organization" and must also meet one of the following requirements:

> (1) Possesses a valid certificate or license as a paramedic from another state and who successfully passes the paramedic practical and written certification examinations as set forth and approved by the commission. Application for certification shall be postmarked or delivered to the agency office within six (6) months after the request for reciprocity.
>
> (2) Has successfully completed a course of training and study equivalent to the material contained in the Indiana paramedic training course and successfully completes the written and practical skills certification examinations prescribed by the commission.
>
> (3) Possesses a valid National Registry paramedic certification.

836 Ind. Admin. Code 4-9-6(a).[7]

5. The evidence is uncontroverted that the Petitioner possessed a valid National Registry paramedic certification at the time of his September 6, 2013, application. The Petitioner's application contains his National Registry number and National Registry Certification information. The Petitioner has thus proved with substantial and reliable evidence that he satisfied the requirement of 836 Indiana Administrative Code 4-9-6(a)(3) when he applied for licensure.

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[7] As the Respondent notes in its proposed findings, this regulation has been superseded by an emergency rule promulgated by the Emergency Medical Services Commission and that took effect on July 1, 2012: LSA Document #12-393(E), § 58, DIN 20120711-IR-836120393ERA, *available at* http://www.in.gov/dhs (select "Boards & Commissions" from left-hand menu, then "EMS Commission," then follow link to "Emergency Rule Concerning the Change to Certifications"). The text of Rule 12-393(E) may also be found by going to the Indiana General Assembly's database for the Indiana Register, www.in.gov/legislative/register/irtoc.htm, and—assuming one knows the required information already—entering "12-393" in the LSA Document # search box or entering "20120711-IR-836120393ERA" in the Register DIN search box.

The Commission has the authority to implement emergency rules related to the certification of emergency services personnel in accordance with the procedures set forth in Indiana Code § 4-22-2-37.1. Ind. Code § 16-31-3-24. Such rules expire on the later date of July 1, 2014, or the date at which a permanent rule is adopted to replace the emergency rule. Ind. Code §16-31-3-24. Because no permanent rule has been adopted in the three-and-a-half years since Rule 12-393(E) was published, Rule 12-393(E) remains valid—if exceedingly difficult for the public (or even trained legal professionals) to find and identify as authority if they do not already know about its existence. In any case, the substantive difference between 836 Indiana Administrative Code 4-9-6(a) and Rule 12-393(E) simply reflects the change from paramedics being "certified" to being "licensed." E.g., Rule 12-393(E) generally uses the words "licensure" or "license," not "certification" or "certificate." And nothing therein impacts the outcome of this appeal.

6. But the evidence does not support a conclusion that the Petitioner was affiliated with a certified paramedic provider organization at the time of his September 6, 2013, application. In fact, the Petitioner's own cover letter for that application appears to state the opposite—that he "do[es] not plan to be employed as a paramedic," instead needing his Indiana license to teach emergency services courses, but that he "ha[d] spoken with [his] local ambulance service and they do not permit people to 'affiliate' unless they are going to actually work the street." (Resp. Ex. 9 at 1.)

   Thus, not only has the Petitioner failed to provide substantial and reliable evidence that he was "affiliated with a certified paramedic provider organization" in accordance with 836 Indiana Administrative Code 4-9-6(a), but his own words are substantial and reliable evidence that he does *not* meet that regulatory requirement.

7. Even assuming this requirement had been met, though, the Respondent is authorized by statute to deny licensure if an applicant

   > would be subject to disciplinary sanctions under [Indiana Code § 16-31-3-14(b)] if that person were a certificate holder or license holder, has had disciplinary action taken against the applicant or the applicant's certificate or license to practice in another state or jurisdiction, or has practiced without a certificate or license in violation of the law.

   Ind. Code § 16-31-3-14(d).

   Indiana Code § 16-31-3-14(b) lists the sanctions that the Respondent may impose if a license holder is found to be subject to discipline under Indiana Code § 16-31-3-14(a). And Indiana Code § 16-31-3-14(a) permits the Respondent, among other things, to impose disciplinary sanctions upon a license holder if the Respondent

   > determines that the . . . license holder:
   > * * *
   > (5) is convicted of a crime, if the act that resulted in the conviction has a direct bearing on determining if the . . . license holder should be entrusted to provide emergency medical services;
   > * * *
   > (11) is subjected to disciplinary action in another state or jurisdiction on grounds similar to those contained in this chapter.

   Ind. Code § 16-31-3-14(a).

In broad terms then, the Respondent may deny an application for licensure if:

- the applicant has prior convictions and the acts underlying those convictions have a direct bearing on whether the applicant should be entrusted to provide emergency medical services;

- an applicant has had disciplinary action taken against his or her certificate or license to practice in another state or jurisdiction (on grounds that would be similarly actionable in Indiana); or

- the applicant has practiced without a certificate or license in violation of the law.

The Respondent is not compelled to deny licensure when one of these circumstances is met. It (and the ALJ in this appeal) is instead afforded discretion in making that decision. See Ind. Code § 16-31-3-14(d) (Respondent "*may* deny certification" (emphasis added)); Hoagland v. Franklin Twp. Cmty. Sch. Corp., 27 N.E.3d 737, 745–46 (Ind. 2015) (word "shall" in statute construed as mandatory unless otherwise clear from context, whereas "may" is permissive and not compulsory).

Here, the Respondent argues—as it has all along—that denial is appropriate pursuant to the provisions provided above, regardless of whether the Petitioner satisfies the requirements of 836 Ind. Admin. Code 4-9-6.[8] (Resp. Prop. Findings at 3.)

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[8] Indiana Code § 16-31-3-14(a) contains other provisions that arguably could apply here as well. For example, subsection (a)(1) would allow the Respondent to deny licensure if the applicant had "engaged in or knowingly cooperated in fraud or material deception in order to obtain a certificate or license, including cheating on a certification or licensure examination." Subsection (a)(2) would also allow the Respondent to deny licensure if the applicant "engaged in fraud or material deception in the course of professional services or activities."

And here the evidence shows that the Petitioner was disciplined in New Jersey for "deceptive or fraudulent procurement of certification." (Resp. Ex. 4 at 8.) This is a clear violation of subsection (a)(1). Moreover, the Petitioner was later disciplined in Pennsylvania for misrepresenting to a medical center that RMT was authorized to provide advanced life support when the Petitioner knew that to not be true, and in reliance of that misrepresentation the medical center entered into a contract with RMT. (Resp. Ex. 6 at 3.) This is arguably fraud and material deception in the course of a professional service or activity in violation of subsection (a)(2). See Loomis v. Ameritech Corp., 764 N.E.2d 658, 667 (Ind. Ct. App. 2002) ("The essential elements of actual fraud are: 1) material misrepresentation of past or existing facts by the party to be charged, 2) which was false, 3) which was made with knowledge or reckless ignorance of the falsity, 4) was relied upon by the complaining party, and 5) proximately caused the complaining party injury."), trans. denied.

Nevertheless, the Respondent proceeded only with allegations based on subsections (a)(5) and (a)(11). These are therefore the only provisions which will be substantively considered in this decision.

8. This position imposes a burden of production on the Respondent as it amounts to an affirmative defense. "Whether a defense is affirmative 'depends upon whether it controverts an element of a plaintiff's prima facie case or raises matters outside the scope of the prima facie case.'" Willis v. Westerfield, 839 N.E.2d 1179, 1185 (Ind. 2006) (quoting Paint Shuttle, Inc. v. Continental Cas. Co., 733 N.E.2d 513, 524 (Ind. Ct. App. 2000), trans. denied). Put another way, "[a]n affirmative defense is a defense 'upon which the proponent bears the burden of proof and which, in effect, admits the essential allegations of the complaint but asserts additional matter barring relief.'" Id. (quoting Paint Shuttle, 733 N.E.2d at 524).

   This is true whether or not the defense is listed in the Indiana Trial Rules—even if those rules applied in this instance, which they do not. See id. (Indiana Trial Rule 8(C)'s list of affirmative defense is not exhaustive); Ind. Trial Rule 1 (Trial Rules govern procedure and practice "in all courts of the state of Indiana").

   The scope of the prima facie case here encompasses only the requirements of 836 Indiana Administrative Code 4-9-6. The Respondent's assertion of violations of Indiana Code § 16-31-3-14 raises matters outside the scope of that prima facie case and—though the Respondent does not concede any elements of the prima facie case—asserts an additional matter that would bar the Petitioner's relief. It is therefore effectively an affirmative defense for purposes of this administrative appeal, for which the Respondent bears the burden of proof and production. Willis, 839 N.E.2d at 1185; Ind. Code §4-21.5-3-14(c).

   To succeed in carrying that burden, the Respondent must therefore have presented substantial and reliable evidence in support of its affirmative defense. It has done so.

9. With respect to the first of the denial conditions, it is important to note that it is not simply the Petitioner's conviction itself that matters—it is instead his specific criminal conduct that matters. See. Ind. Code § 16-31-3-14(a)(5) ("the act that resulted in the conviction"); -14(f) (except as provided for specific convictions, denial is not appropriate "because the applicant . . . has been convicted of an offense," but instead "[t]he acts from which the applicant's . . . conviction resulted may be considered as to whether the applicant . . . should be entrusted to serve the public in a specific capacity."); cf. Ind. State Bd. of Registration and Educ. for Health Facility Adm'rs v. Cummings, 180 Ind. App. 164, 174, 387 N.E.2d 491, 497 (1979) ("The purpose of the statute forbidding the use of convictions to deny licenses is to require that the nature of the acts underlying a conviction be explored, and, in turn, be related to both a specific statutory requirement and, further, to the occupation or profession.").

10. The Respondent has presented evidence of the Petitioner's 1990 Colorado conviction for obstructing government operations and his 2001 Pennsylvania convictions for harassment by communication. It argues that "the acts that led

to these convictions have a direct bearing on whether Petitioner should be entrusted to provide emergency medical services." (Resp. Prop. Findings at 4.) The ALJ agrees in part.

11. There is no evidence of the actual acts that underlie the Pennsylvania convictions or whether those acts have a direct bearing on whether the Petitioner should be entrusted to perform emergency medical services. That the Petitioner was convicted of ten counts of harassment by communication is a fact. But as noted above, except in specific instances the mere fact of a conviction is not enough for a license to be denied, revoked, or suspended. Ind. Code § 16-31-3-14(f).

12. Here, "the nature and extent" of the Petitioner's acts that resulted in his Pennsylvania convictions "remains a mystery." Cummings, 180 Ind. App. at 170, 387 N.E.2d at 495. Under Pennsylvania's criminal code, third-degree misdemeanor harassment—the grade of offense for which the Petitioner was convicted—is committed by a person

> when, with intent to harass, annoy or alarm another, the person:
> * * *
> (4) communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures;
> (5) communicates repeatedly in an anonymous manner;
> (6) communicates repeatedly at extremely inconvenient hours; or
> (7) communicates repeatedly in a manner other than specified in paragraphs (4), (5) and (6).

18 Pa. Cons. Stat. § 2709(a), (c)(2). But this tells nothing of the nature of the acts themselves—was it similar conduct to the Petitioner's interaction with the EMS Office? Was it similar to his interference with the campus police in Colorado? Was the victim a person the Petitioner knew personally or professionally? Is the conduct likely to recur? And how would/does it bear on the Petitioner's capability to perform emergency medical services? Without more facts, none of these questions can be answered with anything but speculative assertion.

And speculative assertion is insufficient. "It is possible that the circumstances and deeds underlying the convictions were such a nature as to indicate that . . . he should not be entrusted with a license . . . [b]ut upon the facts before us, the situation could also be of a nature not likely to be repeated and insufficient as a basis for denial." Cummings, 180 Ind. App. at 171, 387 N.E.2d at 495; see also id. at 171, 387 N.E.2d at 495–96 ("Where only speculation furnishes the basis for a decision, such determination is arbitrary and capricious.").

13. The Respondent has not carried its burden and produced substantial and reliable evidence that the acts underlying the Petitioner's 2001 Pennsylvania convictions for harassment by communication have a direct bearing on whether the Petitioner should be entrusted to perform emergency medical services. Those convictions therefore cannot be used pursuant to Indiana Code § 16-31-3-14 as a basis to deny the Petitioner's application for licensure.

14. The Petitioner's 1990 Colorado conviction for obstructing government operations is a different matter, though—there is substantial and reliable evidence of the acts underlying this conviction[9], and from the Petitioner's own hand at that. He wrote:

> My involvement in this incident was as a participant (one of three) people who were concerned over a series of rapes which took place [at] the Univ. of Colorado, Boulder while CU police were concerned with patrolling areas off campus, in the City of Boulder, rather than on-campus.
>
> We intentionally attempted to obstruct officers from providing services off-campus, directly, through complains *(sic.)* to administration and other means, including interfering with the police communications of officers off-campus.

(Resp. Ex. 3 at 8.) Thus here there is more than simply the title of the crime to go on and there is no need for speculation as to the nature and extent of the Petitioner's conduct.

Instead, there is substantial and reliable evidence that the Petitioner, as part of a group, intentionally interfered with campus police officer communications in an attempt to prevent those officers from providing services to individuals in the community off-campus—and the Petitioner did so because he disagreed with what he believed were the police department's priorities.

15. And as a paramedic with an affiliated provider, the Petitioner would be charged with responding to emergency calls in that provider's area—and charged with responding as directed and in conjunction with other emergency responders. Such is not a place for the Petitioner to set and follow his own personal priorities or agenda. Thus a conviction in Colorado based on intentionally obstructing emergency responders because they were not responding to things that the Petitioner thought were more important has a direct bearing on whether the Petitioner should be entrusted to fill an emergency responder role in Indiana.

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[9] "A person commits obstructing government operations if he intentionally obstructs, impairs, or hinders the performance of a governmental function by a public servant, by using or threatening to use violence, force, or physical interference or obstacle." Colo. Rev. Stat. § 18-8-102(1)).

16. The Respondent has also produced evidence that the Petitioner has been subjected to professional disciplinary action in another state or jurisdiction and argues that those disciplinary actions were for grounds similar to those contained in Indiana Code 16-31-3.[10] The Respondent is correct.

17. Specifically, there is evidence of the following disciplinary actions, each of which was for a matter similar to one contained in Indiana's emergency medical services statutes and regulations.[11]

    - In 1993, the Petitioner's EMT-Paramedic certification was revoked in Kern County, California, for possession and unauthorized use of advanced life support medication and equipment.[12]

      Indiana likewise prohibits paramedics "from having in their possession, or maintained on board emergency response vehicles, any advanced life support equipment or supplies

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[10] Indiana Code § 16-31-3-14(a)(11) includes the requirement that the disciplinary action in the other state or jurisdiction be "on grounds similar to those contained in this chapter." Indiana Code § 16-31-3-14(d), however, permits the Respondent to deny licensure to an applicant who "has had disciplinary action taken against the applicant or applicant's certificate or license to practice in another state or jurisdiction"—with no additional requirement that the disciplinary action be on grounds similar to any basis contained in Indiana law or regulations. But again, the Respondent has proceeded under the more stringent allegation of subsection (a)(11) so that will be the baseline for how this evidence is reviewed.

[11] While Indiana Code § 16-31-3-14(a)(11) provides that the out-of-state disciplinary action must be on grounds similar "to those contained in this chapter," Indiana Code chapter 16-31-3 also prohibits violating any rules adopted by the Emergency Medical Services Commission in the course of implementing that chapter. Ind. Code § 16-31-3-14(a)(7). So even though the violated Indiana provision here might be contained in the Indiana Administrative Code, so long as the provision was adopted pursuant to the implementation of chapter 16-31-3, it qualifies under subsection (a)(11).

[12] There was some indication at the evidentiary hearing that the State of California had, subsequent to the Kern County action, divested its counties of the authority to decertify emergency responders. This is an assertion that the Petitioner has apparently raised in prior disciplinary matters, (see Resp. Ex. 4 at 5), but there is no evidence or law that the ALJ can find to verify this or—more importantly—that this divestment of authority vacated the Kern County sanction.

Similarly, the Petitioner states in his proposed findings that he was certified by the State of California and that "[t]he 'State of California' never revoked Petitioner's certification." (Pet. Prop. Findings at 2.) The evidence seems to indicate, tangentially, that at least the first portion of that statement might be true—the Pennsylvania court conducting judicial review in 2002 of the Petitioner's decertification notes in its order that the Petitioner "was re-certified in California some years later" although it also notes that "there is no evidence in the record that that re-certification vitiated the Kern County action." (Resp. Ex. 6 at 5.)

But in any case, whether the Petitioner was later certified in California or not, or whether California ever sanctioned him or not, is irrelevant. The Petitioner *was* professionally sanctioned by Kern County. And Indiana Code § 16-31-3-14(a)(11) allows the Respondent to consider relevant disciplinary actions "in another state or jurisdiction." The Petitioner does not—cannot—contend that Kern County is not *in* California. Likewise, he does not—cannot—contend that a county is not a jurisdiction in the sense intended by the statute. The Kern County action is therefore valid for consideration in this matter.

that have not been approved in writing by the paramedic provider organization medical director." 836 Ind. Admin. Code 4-9-3(d).[13]

- In 1998, the Petitioner's EMT-Paramedic certification was suspended in New Jersey for intentionally omitting a material fact—the fact of the Kern County revocation—from his application. Similarly, Indiana prohibits engaging in material deception in order to obtain a paramedic license. Ind. Code § 16-31-3-14(a)(1).

- In 1999, the Petitioner's EMT-Basic certification was permanently revoked in New Jersey for administering medication to a patient in a manner outside the authorized scope of practice for his certification level.

  EMTs in Indiana are also prohibited from performing procedures "that have not been approved by the [Emergency Medical Services Commission] as being within the scope and responsibility of the emergency medical technician." 836 Ind. Admin. Code 4-4-1(e). More specifically, in Indiana only a licensed paramedic or certified advanced emergency medical technician may perform advanced life support in an emergency—including administering epinephrine intravenously. Ind. Code § 16-31-3-21(a); 836 Ind. Admin. Code 1-1-1(2)(B)(iii) ("Advanced life support" includes "[p]arenteral injection of appropriate medications"; i.e., through intravenous injection); 836 Ind. Admin. Code 1-1-1(12)(J) ("Basic life support" includes administration of epinephrine but only "through an auto-injector"; i.e., an EpiPen).

- Pennsylvania revoked the Petitioner's EMT and paramedic certifications and denied the Petitioner's application for an advanced life support license because the Petitioner misrepresented to a medical center that his business was authorized to transport advanced life support patients; provided an unlicensed (in Pennsylvania) basic life support ambulance to transport an advanced life support patient; had been convicted in Colorado of obstructing government operations; had been sanctioned in California and New

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[13] As discussed at length above, this provision has been superseded by Rule 12-393(E); the only substantive change, however, is that in the emergency rule this specific prohibition is subsection (e)—and only because subsection (a) was added to notify the reader that 836 Indiana Administrative Code 4-9-3 was superseded by the emergency rule. See LSA Document #12-393(E), § 55.

Jersey; and for not being a responsible person to staff an ambulance service.

And in Indiana "[a] person may not furnish, operate, conduct, maintain, or advertise advanced life support as part of the regular course of doing business unless the person holds a valid certificate or provisional certificate issued by the [Emergency Medical Services Commission] to provide advanced life support." Ind. Code § 16-31-3-22. Also, a certificate or license holder in Indiana is subject to sanction for "engag[ing] in fraud or material deception in the course of professional services or activities," Ind. Code § 16-31-3-14(a)(2), and for "advertis[ing] services or goods in a false or misleading manner," Ind. Code § 16-31-3-14(a)(3).

Additionally, ambulance service providers in Indiana must be certified—and certified *in* Indiana—and it would be impermissible to employ an ambulance not certified by the Emergency Medical Services Commission. 836 Ind. Admin. Code 1-2-1(a), (c). And finally, just as Pennsylvania does, Indiana authorizes the imposition of professional discipline for acts resulting in criminal convictions and for out-of-state professional sanctions. Ind. Code § 16-31-3-14(a)(5), (a)(11).

The evidence demonstrating the fact of these disciplinary actions is substantial and reliable—to be more clear, the evidence is overwhelming and virtually unrebutted.[14]

18. The Respondent has carried its burden of producing substantial and reliable evidence in support of its affirmative defense. The Petitioner's application for paramedic licensure may therefore be denied based on his 1990 Colorado conviction and out-of-state disciplinary actions.[15]

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[14] Indiana Code § 16-31-3-14(d) provides that "[a] certified copy of the record of disciplinary action is conclusive evidence of the other jurisdiction's disciplinary action," but that does not mean that a certified copy is the *exclusive* form of evidence of the action. Here the evidence did not include certified copies of the out-of-state disciplinary actions, but there is nothing in the form of the evidence—which was admitted by stipulation anyway—to undermine its reliability or veracity.

[15] The Petitioner argues that "even if a violation did exist, the Indiana Code only allows for a maximum sanction of 7-years. Petitioner's actions are all more than 14 years old, twice the maximum permitted by Indiana Code." (Pet. Prop. Findings at 6.)

If this is an argument that the Respondent is not authorized to deny a license based on conduct older than seven years, then that is not correct. Indiana Code § 16-31-3-14(b) provides that the Respondent may impose a variety of sanctions upon a certificate or license holder, including revocation or suspension of that certificate or license "for a period not to exceed seven (7) years." Ind. Code § 16-31-3-14(b)(1), (2). In other words, this provision limits the length of the sanction the Respondent may impose. Nothing in Indiana Code §§ 16-31-3-14(a)(5), (a)(11), or (d), however, places

19. But again, such denial is not compulsory—the statute says the Petitioner's application for licensure *may* be denied. Ind. Code § 16-31-3-14(d). In some instances where the concerning pre-application conduct exists it may still be appropriate to grant an application; or to issue the license but subject it to probationary restrictions aimed at ameliorating any residual concerns about the conduct. See, e.g., In re Owens, 14-24-EMSC (Aug. 19, 2015).

20. Here, however, outright denial of the Petitioner's application is unequivocally appropriate even in light of Mr. Brown's endorsement. The Petitioner's prior conduct indicates a pattern of willful and intentional disrespect and disregard for the rules, protocols, and procedures that govern the practice of emergency response medicine and governmental operations. And when the lives of vulnerable, sick, and injured Hoosiers could quite literally hang in the balance, that sort of repeated professional misbehavior is intolerable and cannot be condoned or permitted. Cf. In re Moody, 428 N.E.2d 1257, 1261–62 (Ind. 1981). The hazard to the public is simply too great.

    Moreover, the Petitioner demonstrates no shred of acceptance of, much less remorse for, any of that past criminal and professional misconduct—an attitude that cuts sharply against any level of leniency. See Owens, 14-24-EMSC at 9. In fact, he appears to refuse to even acknowledge or recognize that these incidents occurred at all (or does so only to dispute the authority or motives of the other parties involved), a tone the Petitioner appears to have struck in many of those same proceedings as well—and a tone which reinforces the conclusion that he is recalcitrant, truculent, and unfit to serve in Indiana as a paramedic.[16]

    To put it more bluntly, the Petitioner has engaged in a pattern of conduct that has resulted in sanctions on his professional certificates and licenses in three states and a conviction in a fourth. There is no evidence whatsoever to support a conclusion which risks Indiana becoming the fifth state on that list.

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a temporal limit on how far back into an applicant's criminal or professional history the Respondent may look when considering an initial application.

And if this is an argument that denial is inappropriate—rather than unauthorized—because the prior conduct's relative age, then that is a mitigating factor that has been weighed by the ALJ. But in light of the considerations stated in Conclusion 20, the passage of time from misconduct to now is unpersuasive.

[16] The Petitioner's evidence also included a letter from the owner of Keystone Medical Response in Pennsylvania, Mr. David G. McIntyre, III, endorsing the Petitioner's qualifications as a paramedic. (Pet. Ex. 18.) But that letter strikes the same unapologetic chord with respect to the Petitioner's prior professional sanctions, saying that Pennsylvania and New Jersey "worked in tandem to attack [the Petitioner] and even tried to convince me to work in cohort with them," and that the Petitioner "was caught up more in personal vendetta politics with the powers-that-be." (Pet. Ex. 18 at 2.) A letter from the owner of a business entity sanctioned alongside the Petitioner in Pennsylvania (though the business's sanction outcome is unknown) and being likewise derisively dismissive of the Petitioner's past misconduct is—like the passage of time between misconduct to now—unavailing for the Petitioner.

21. In sum, the Petitioner has failed in his burden of proving by substantial and reliable evidence that he fulfilled all the requirements for licensure as a paramedic contained in 836 Indiana Administrative Code 4-9-6(a). And even if he had, the Respondent has proven by substantial and reliable evidence that the Petitioner's application should be denied in accordance with Indiana Code § 16-31-3-14(d) because of the Petitioner's prior conviction and past professional disciplinary actions.

Decision and Non-Final Order

The Petitioner's application for licensure as a paramedic is hereby **DENIED**.

The Indiana Emergency Medical Services Commission is the ultimate authority in this matter. It will consider this non-final order in accordance with the provisions of Indiana Code §§ 4-21.5-3-7 thru -29 and the Notice of Non-Final Order also issued today.

Date: January 7, 2016

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